

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77 - 2131

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JAMES F. HEIMERLE,

Petitioner-Appellant

-v.-

UNITED STATES OF AMERICA,

Respondent-Appellee

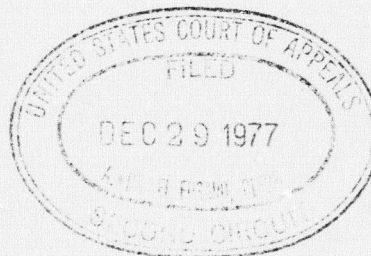
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APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

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APPELLANT'S BRIEF

=====



JAMES F. HEIMERLE
Pro Se Appellant
PMB 01873
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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.	1
QUESTIONS PRESENTED.	4,5
STATEMENT OF THE CASE.	1

ARGUMENT:

POINT 1. THE COURT BELOW ERRED AS A MATTER OF LAW BY FAILING TO HOLD A HEARING IN A HABEAS CORPUS PROCEEDING WHEN THE GOVERNMENT DISPUTED THE FACTS THAT WENT PREVIOUSLY UNDISPUTED; THE FACTS OF WHICH IN THE FIRST INSTANCE COMPELLED THE ISSUANCE OF THE WRIT.

- a) the court erred further by not holding a hearing to ascertain the reason for the unusual delay between indictment--arraignment --and trial.
- b) the court erred further by not holding a hearing in the first instance due to the fact that defendant was arraigned ninety (90) days after being indicted in violation of rule 43 F.R.Crim.P.
- c) the court erred additionally at the time of appellant's motion for reconsideration by not adhering to the doctrine of stare decisis

POINT 2.

THE COURT ERRED AS A MATTER OF LAW AND FACT BY NOT ALIGNING WITH THE DECISION OF ANOTHER COURT WHEREIN HABEAS CORPUS RELIEF WAS GRANTED BASED ON FACTS AND CIRCUMSTANCES THAT PRECLUDED THE INSTANT COURT FROM REACHING ANYOTHER CONCLUSION.

- a) particularly so due to the fact that the other court based its findings to grant habeas corpus relief on a violation of art. iv(e) of the I.A.D. that antedates the defendants initial appearance before the court below.

POINT 3.

THE COURT ERRED AS A MATTER OF LAW BY NOT ADHERING TO THE STRICT MANDATE OF THE I.A.D. TO WIT: THE COURT MUST DISMISS INDICTMENTS WHEN ARTICLES THAT REQUIRE SAME ARE IN FACT VIOLATED.

- a) the court below by virtue of not abiding by the strict mandates of the I.A.D. sanctioned future violations and encourages further nonfeasance from the department of justice

TABLE OF CASES

	<u>Page</u>
Enright v. U.S., 434 F.Supp. 1056	
Enright v. U.S., <u>437</u> F.Supp. <u>580</u> (aff'd reargument)...	6
Haines v. Kerner, 92 S.CT. 594.	5,6
Heimerle v. U.S., 76 Civ 5563(S.D.N.Y.)	3,4
Heimerle v. U.S., 76 Civ 5669(S.D.N.Y.)	3,4
Speed v. U.S., ____ F.Supp. ____ (T-76-10-C)	
Speed v. U.S., ____ F.2d. ____ (77-1126).	4,6,7
Wilwording v. Swenson, 92 S.CT. 409.	6
U.S.v. Cyphers & Ferro, <u>556</u> F.2d. <u>630</u> (76-1131, 76-1160). . .	7
U.S.v. Cumberbatch, ____ F.Supp. ____ (Government did not appeal decision).	7
U.S. v. Ford, 550 F.2d 732.	6
U.S. v. Hayman, 342 u.s. 205	5
U.S.v. Heflin, 358 u.s. 419	5
U.S. v. Heimerle, ____ F.2d. ____ (77-1576).	3
U.S. v. International Minerals and Chemical Corp, 91 S.CT. 1697	8
U.S. v. Lee, 435 F.Supp. 974.	8
U.S. v. Mauro, 414 F.Supp. 358, aff'd 544 F.2d. 588	Passim

STATUTES AND AUTHORITIES

Page

Title 18, Sections:

371	
472	
473	
1341	1
App.. . . .	Passim

Title 28, Section:

2241-2255	
Habeas Corpus Generally	Passim

Federal Rules Appellate Procedure,

Rule 26	4
-------------------	---

Federal Rules Criminal Procedure

Rules	
12.	7
43.	6

District Court General Rules, Local

Rule	
9(m).	4

Authorities

SOKOL, Federal Habeas Corpus	5
U.S.Cong.Administrative News	8

FOOTNOTES	10
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-v.-

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UNITED STATES OF AMERICA, :

Respondent-Appellee

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BRIEF ON BEHALF OF PETITIONER-APPELLANT

JAMES F. HEIMERLE

PRELIMINARY STATEMENT

This is an appeal from a District Court Order, BRIEANT, U. S.D.J., sitting for the S.D.N.Y., denying habeas corpus relief for violations of the Interstate Agreement on Detainers, dated July 6, 1977; the Order of which vacated the previous Order granting relief based on the identical violations of the Interstate Agreement on Detainers, dated December 15, 1976.

STATEMENT OF THE CASE

On December 6, 1972 Heimerle and others were indicted by a Grand Jury sitting in and for the Southern District of New York on Indictment No. 72 CR 1330 charging violations of 18 U.S.C. §§ 371, 472, 473: Heimerle and one other person were also charged with violating 18 U.S.C. §§ 1341, and 371, this Indictment was designated No. 72 CR 1331. The latter being the subject of the instant appeal.

On January 18, 1973, Heimerle was writted in from New York State Prison where he was then serving a term of four (4) years, the Prison, SingSing, was located in Ossning New York; the sole purpose of commanding Heimerle's appearance at the U.S. Courthouse was for prosecution on Indictment[s] 72 CR 1330 and 72 CR 1331 [hereafter 1330 or 1331]. Judge Carter arraigned Heimerle on both indictment[s]; at which time requests for bail[s] were denied. Immediately thereafter, Heimerle was lodged at Federal Detention Headquarters. The following day, January 19, 1973, the Government filed Notice[s] of Readiness for Trial. See Docket Entries at page 2 of 1331 c.f. page 2 of 1330; appendix pages 1 and 5. ¹

On or about February 23, 1973, Heimerle was returned to New York State Prison, notwithstanding the Government's intent to proceed to trial and Heimerle's request to remain at the Federal Detention Headquarters; for purposes of conferring with counsel.

On or about March 19, 1973, Heimerle was writted in from SingSing, to obey a Court Order to make voice exemplars that were to be used in 1330 and 1331 prosecutions. While in on this specific writ, Heimerle's counsel requested that Heimerle be lodged at Federal Detention Headquarters, to confer with Heimerle. The Court deemed it unnecessary, due to the fact that he [the Court] drove the same distance everyday(app.p. 35,36). Heimerle thereafter was returned to SingSing, Ossining, New York. Shortly thereafter, Heimerle was transferred upstate to GreeHaven State Prison, Stormville, New York.

On May 3, 1973, Heimerle was writted in from GreenHaven for prosecution on 1330 and 1331 once again, upon arrival at the Foley Square Courthouse, trial on 1330 commenced; after a five (5) day trial; Heimerle and others were found guilty [including the co-def-

endant from 1331]; sentence was set for June 18, 1973.

On May 18, 1973; Heimerle's co-defendant on 1331, changed his previously entered not guilty plea to guilty; sentence was set for June 20, 1973 -- at which time sentence was imposed to run concurrent to the sentence imposed in 1330; the latter imposed on June 18, 1973.

On July 6, 1973, Heimerle was returned to Green Haven State Prison, Stormville, New York. Heimerle had been sentenced to a consecutive term of imprisonment on 1330, by Judge Carter.

On July 22, 23, 1974; Heimerle was writted in from Green Haven State Prison once again; at which time the previously entered plea of not guilty was withdrawn [upon legal advice discussed infra] ^{2/} and a plea of guilty to Count Two (2) only was entered. The following day sentence was suspended and Heimerle was placed on probation: to commence upon completion of the sentence imposed in 1330.

On June 15, 1976 and November 15, 1976; Heimerle was sentenced to two terms of federal imprisonment. The convictions of which were both predicated in part; as was the sentence[s]; on the conviction[s] in 1330 and 1331. As explicated in U.S.v. Heimerle, ___F.2d.__(dkt.no. 77-1576; and, of course, Appellant's brief[s])

On December 15, 1976, Judge Brieant, upon the habeas corpus petition of Heimerle, dismissed Indictment 1331. The facts were undisputed -- and the Court took note of Heimerle's plea of guilty -- thereby negating the need for an evidentiary hearing. (app.p. 16, 17)

On June 22, 1977, Judge Carter, upon the habeas corpus petition of Heimerle, dismissed Indictment 1330 with prejudice. (app. p. 33, 27)

On July 6, 1977, Judge Brieant, based on what he referred to as a newly discovered point -- he discovered that Heimerle pled

guilty -- vacated the Order of December 15, 1976; without an evidentiary hearing. Factually, this latter opinion totally contradicts the former. See appendix page 17. c.f., appendix page 23.

On July 26, 1977, Heimerle's Motion and Memorandum, pursuant to Rule 9 (m) of the local district court rules, was denied. Attached thereto to become a part thereof, was an opinion on all four with the facts and circumstances of the instant case. See appendix page 37-41.

On December 1, 1977, the Government's brief was scheduled in their appeal from the Order of Judge Carter, i.e., docket no. 77-2119. However, approximately two (2) weeks after the deadline no briefs were filed; nor, for that matter, was Rule 26 (b) Fed. R. App. P. utilized. 3/

QUESTIONS PRESENTED

(1) DID THE COURT BELOW ERR AS A MATTER OF LAW BY FAILING TO HOLD A HEARING WHEN THE GOVERNMENT SUDDENLY DECIDED TO OPPOSE THE ORIGINAL PETITION AFTER A DECISION ADVERSE TO THEIR INTERESTS WAS DECIDED?

- a) likewise, did the failure to hold a hearing deprive Heimerle of the right to establish that his Speedy Trial Rights were seriously abused?
- b) did the failure of the Court to inquire (sua sponte) into the obvious violation of Article 1V(c) [120 day] mandate deny Heimerle adequate habeas corpus review?
- c) was reconsideration erroneously granted [in toto] due to no intervening change in law, facts and/or circumstances?

(2) DID THE COURT BELOW ERR BY TOTALLY DISREGARDING ANOTHER FEDERAL COURT RULING WHEREIN THAT COURT RELIED UPON A RULING WITHIN THE SECOND CIRCUIT; AND THE FACTS AND CIRCUMSTANCES OF THAT CASE WERE IDENTICAL TO THOSE OF THE INSTANT CASE?

A) likewise, did the Court err insofar that; Judge Carter's dismissal based on the arraignment of January 18, 1973, on indictment[s] 1330 & 1331; coupled with other federal court interpretation of Mauro: thus compelling dismissal under the doctrine of stare decisis -- render the order of July 6, 1977 erroneous?

(3) CAN A DEFENDANT KNOWINGLY WAIVE A RIGHT HE KNEW NOT ABOUT AND BE PENALIZED FOR NOT KNOWING OF ITS EXISTENCE?

B) particularly, when the opposing parties by virtue of statute and legislative intent, were in fact, by virtue of their Oath[s] -- compelled to enforce said statute defendant was kept ignorant of?

ARGUMENT

POINT 1.

Based on the holding in U.S.v. Hayman, 342us205 it is clear that the sole purpose of the statute [2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights as in 2241 in another and more convenient forum, accord Heflin v. U.S., 358us419. Factually, 2241 and 2255 are discussed jointly by recognized legal scholars, see Federal Habeas Corpus(Sokol) 1969 Edition generally; §§ 24-24.6 and 25 specifically. Most Courts have held that habeas corpus litigants are not learned in the law or, for that matter, well educated. Because of the handicaps habeas corpus petitions are to be construed most liberally, Haines v. Ker-

ner, 92 S.CT. 594; also se, Wilwording v. Swenson, 92 S.CT.409.

Thus, since Heimerle's claim of violations of the Interstate Agreement on Detainers was valid enough to warrant relief upon the moving papers; without opposition. The Court below should have become suspicious when after granting relief to Heimerle, the Government, then, for the first time, comes forward accusing the Court and Heimerle of improprieties. Factually, at that point in time it was the Government that should have had to bear the burden of appealing the Court's Order. In any event, the dispute in facts should have been, at the very least, resolved by holding an evidentiary hearing as did the Court in Enright v. U.S., 434 F.Supp. 10-56, and in Speed v. U.S., ___ F.Supp. ___ (appeal dismissed on Government's motion 7/27/77). 4/

Moreover, the failure to hold an evidentiary hearing when in fact the time from indictment to arraignment in absentia [December 6, 1972 to March 19, 1973] as the Court then knew it to be; was well over ninety days, which was certainly a violation of speedy trial rules however, promulgated at that point in time. But more importantly, even Rule 43 F.R.Crim. P. was believed to have been violated as is readily apparent from a cursory view of the docket sheet. These facts when coupled with the total delay of approximately eighteen (18) months from indictment to judgement, should have triggered the Court to [sua sponte] have held an evidentiary hearing. Especially so, when one considers the fact that pro se petitioner's are unskilled in the law of pleadings. Nevertheless, at the time the Court below issued his Order on reargument; at which time the Court distinguished U.S.v.Ford, 550 F.2d.732; wherein the Court of Appeals held that violation of the 120 day mandate of Article IV(c) compels dismissal: should have, at the very least, warranted the evidentiary hearing as required in habeas corpus matters.

Lastly, the Court below granted reargument and reconsidered his previous decision on the basis of the sole facts that compelled granting the relief sought; to subsequently deny relief, arbitrarily and capriciously. Only a cursory glance at page two (2) of the former and the latter opinions support this contention. See appendix. 5/

POINT 2

The body of case law leading to the opinion of the Court below on December 15, 1976 was in fact the same as that utilized by the Court in Speed; also decided on December 15, 1976. On December 16, 1976, another Court decided similarly based on the same body of case law, i.e., U.S.v. Cumberbatch, 563 F.2d. 494.2. In Cumberbatch, as in Speed, the Government did not finalize an appeal from the Order dismissing the Indictment.

The result reached in Speed, rests on Mauro and cases therein. Likewise, the Court below relied on the same body of National law. Thus, when the Court below was considering the Court of Appeals affirmation of the District Court in Mauro to render the first opinion, and Heimerle supplied to the Court the opinion reached in Speed to consider in Heimerle's motion to re-consider his second opinion. The Court was obliged to reach the same conclusion as a matter of law. Especially so, when all the Government brought out in their motion for reconsideration was the fact that Heimerle pled guilty -- which in fact -- the Court was already aware of. Additionally, when it is taken into account that at the time the Court below denied Heimerle's motion to re-consider, the Court below erroneously ignored an opinion subsequent to Mauro and Ford, that being, U.S.v. Cyphers & Ferro, 556 F.2d. 630. Wherein, waiver was discussed and the Court stated: "...they [Rule 12(f)] are not determinate in construing a statute..." The Court went on to state

"...If a state does take the initiative and bring him from the state of imprisonment to the accusing state it must complete the prosecution before returning him....one purpose of this agreement is to encourage the expeditious and orderly disposition of such charges..." When taken in conjunction with "...prosecutors also can initiate proceedings to obtain trials of prisoners in other jurisdictions against whom charges are pending..or..detainers have been lodged..temporary custody is given to the prosecutor for the purpose of transferring the prisoner and holding trial.." (accord Deputy Attorney General, Richard G. Kleindienst: Legislative History, P.L.-91-538 at 4868). Ignorance of the law has never been an excuse for its violation, e.g., U.S.v. International Minerals AND Chemical Corp., 91 S.C.T. 1697. And the chain of command under the Attorney General assures that all prosecutions, and orders approving of same, come from the Attorney General: he alone bears the responsibility. See generally, U.S.v.Lee, 435 F.Supp.974. Accordingly, the burden of the Attorney General failing to enforce what was known to him, cannot be shifted to a defendant who knew not of its existence.

Since Point 2 embraces point 3 the need to expound further would only prove to be redundant. However, it should be noted that any excuse for not acting in conformity with the Interstate Agreement is negated by the very language incorporated in the Agreement itself, because: "...all courts, departments, agencies, officers, and employees of the United States and the District of Columbia [were] directed to enforce the Agreement..." and based on the fact that "... the Attorney General shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this [IAD] act..." The failure of his subordinates to comply with the Act could only prove that The Attorney General was

guilty of nonfeasance. See Article IX §§ 5 and 6.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED WITH PREJUDICE OR
AT THE VERY LEAST THE CAUSE SHOULD BE REMANDED
FOR AN EVIDENTIARY HEARING IN CONFORMANCE WITH
DUE PROCESS AS APPLIED TO PRO SE HABEAS CORPUS
PETITIONERS UNLEARNED IN THE LAW AND PROCEDURE

Respectfully submitted,

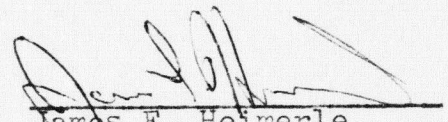
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FOOTNOTES

1. Counsel at the time of arraignment moved for dismissal of both indictments due to the unreasonable and prejudicial delay from indictment to arraignment; all other defendant's had been arraigned timely: thus curtailing Heimerle of invaluable pre-trial preparation time.
2. Counsel advised Heimerle that should the writs, which were ninety (90) percent of the Government's case, be found to be unconstitutional at any time in the future: the conviction would be overturned.
3. After preparing the Brief herein Heimerle has been advised that a recent perusal of the docket sheet in re 77-2119 shows that the Brief & Appendix were timely filed with the Clerk of the Court with proof-of-service. However, the Brief & Appendix were not delivered to the Institution wherein Heimerle is confined. This is not an isolated incident. Factually, most Government papers reach Heimerle approximately two (2) weeks after they are served on the Court -- that is, of course, when the papers do reach their destination.
4. It should be noted that the Enright Court correctly preserved the Government's right to appeal and; in re-argument gave additional time so as not to preclude the Government from appealing c.f., Enright v. U.S., 437 F. Supp. 580. In the instant case, the Government's right to appeal appears to have been preserved. However, in the dismissal of the indictment with prejudice in the companion case(1330); Judge Carter did not preserve the Government's right to appeal[see appendix] as witnessed by the actual dismissal of the indictment. The dismissal of indictment 1330 compels dismissal of the instant indictment, due to the fact that it was founded on violation of the IAD that included indictment 1331, since it, [1331], was sub judice before Judge Carter.
5. In any event the Government was barred from raising alleged facts on re-argument when they chose not to argue those same facts at the initial argument, i.e., Qui tacet, consentire videtur, he who is silent is understood to consent. c.f. Speed re-order of May 24, 1977(non pro tunc) wherein it reveals that that prosecutor did explicitly what this prosecutor did impliedly:
 "...the attorney for the United States having admitted that the United States had violated the Interstate Agreement on Detainers Act and that the writ of Habeas Corpus should issue(sic) [be granted]..."
c.f. appendix 16,22,23. Thus, since the facts went undisputed initially because the Government advised the Court that it did not wish to dispute the facts. Thus placing this instant appeal in the identical posture as was the Speed appeal, except, of course, for the fact that the Court below erroneously granted reargument on the specious grounds of first learning of the guilty plea because otherwise the Government would have been in the same peculiar position as it was in Speed. And like in Speed would have had to withdraw their appeal.

AFFIDAVIT OF MAILING

JAMES F. HEIMERLE, being duly sworn, deposes and says: I have on this 23 day of December, 1977 placed into the hand of the under-signed prison official a true and correct copy of the Appellant's Brief and Appendix in re 77-2131 addressed to the Hon. Robert B. Fiske, Jr., U.S. Attorney/S.D.N.Y., U.S. Courthouse-Foley Square, New York, N.Y. 10007 to be sent via the U.S. Mail.


James F. Heimerle
petitioner-appellant
PMB 01873
Atlanta, Ga. 30315

Sworn to before me this

23 day of December, 1977

Notary Public: Authorized by the Act of
H. R. M. Miller U.S.C.